

1 Law Offices
2 **HINSHAW & CULBERTSON LLP**
3 3200 N. Central Avenue
4 Suite 800
5 Phoenix, AZ 85012
6 602-631-4400
7 602-631-4404
8 vorze@hinshawlaw.com

9 Victoria L. Orze (011413)
10 Attorneys for Defendant

11 UNITED STATES DISTRICT COURT

12 DISTRICT OF ARIZONA

13 Bryan Nichols, } No. CV 08-1491-PHX-FJM
14 Plaintiff, } DEFENDANT'S REPLY RE MOTION
15 vs. } FOR SUMMARY JUDGMENT
16 GC Services, LP, } Oral Argument Requested
17 Defendant. }

18 Defendant GC Services LP, pursuant to FR.Civ.P. 56 and L.R. Civ. 56.1 hereby
19 Replies to Plaintiff's Response to its Motion for Summary Judgment. In short, Mr.
20 Nichols has not demonstrated evidence sufficient to make a prima facie showing of the
21 Defendant's alleged FDCPA violations; summary judgment should be entered in favor of
22 Defendant on all Plaintiff's claims. Defendant will reply to each of Plaintiff's claims in
23 turn:

24 **15 U.S.C. § 1692(e)(5) – Improper Threats:** This section states that it is a
25 violation of the Act for a debt collector to threaten to take any action that cannot legally
26 be taken or that is not intended to be taken. To establish illegal collection conduct, Mr.
Nichols must be able to demonstrate that the collector threatened to take action it could
not legally take, or that the collector or creditor had no intention of taking. *Newman v.*
Checkrite Cal., Inc., 912 F.Supp. 1354, 1379 (E.D.Cal.1995). Specifically, “A
determination of defendants' liability under this claim turns on two questions: (1) whether

1 there was threatened legal action and, if so (2) whether such action could legally be taken
 2 or whether there was an intent to bring a court action in the absence of payment" *Id.* See
 3 also *Gostony v. Diem Corporation*, 320 F.Supp.2d 932 (D.Ariz. 2003).

4 Although his briefings are rife with the conclusion that the Defendant improperly
 5 "threatened" him, Mr. Nichols has not produced any evidence from which a reasonable
 6 jury could conclude that GC Services threatened any action at all.

7 The sum total of Plaintiff's evidence is 1) the collector's entry in Defendant's
 8 Account Detail Listing on February 14, 2008: "WARNED OF AWG TOPS AND LIT
 9 BORR STILL REF'D ALL ARRANGEMENTS/CALL ENDED." 2) the June 11, 2008
 10 entry that "AS LONG AS IN DEF BORR FACIG POSS WG/POSS SEIZURE IF ANY
 11 FED TAX REFUNDS AS WELL AS LITIGATION."¹ and 3) Paul Grover's testimony
 12 explaining the substance of these entries: "We warned of the events of wage
 13 garnishment, the treasure offset program, and litigation." and "we are advising him that it
 14 – this – this process can go to wage garnishment, treasury offset, litigation." *See*, Grover
 15 deposition, p. 157:18-23. At most, the evidence indicates that the Defendant warned Mr.
 16 Nichols of the potential consequences of his failure to resolve his outstanding student
 17 loan.

18 Most notably missing from the record is any testimony from Mr. Nichols that any
 19 of the Defendant's collectors uttered any words or phrases that would constitute a threat.
 20 Mr. Nichols has never said, "GC threatened me," "I felt threatened," or "GC said it would
 21 sue me." There is no evidence that GC's collectors said anything to Mr. Nichols that
 22 could be interpreted as an improper threat. In fact, there is no evidence of record as to
 23 what GC actually said or what Mr. Nichols heard.

24

25 1 Mr. Nichols relies on the Account Detail Listing as his sole evidence of improper threats under
 26 1692e(5), but relative to his other claims he argues that it is inherently unreliable.

1 None of the potential events warned of were or would have been improper. With
2 respect to defaulted student loans, the Department of Education is specifically authorized
3 to levy an administrative wage garnishment against a debtor in default. *See* Section
4 31001(o) of the Debt Collection Improvement Act of 1996 (DCIA), Pub. L. 104-134, 110
5 Stat. 1321-358 (Apr. 26, 1996), Codified at 31 U.S.C. 3720D.

6 The Department of Education is also legally permitted to attach a defaulted
7 debtor's federal income tax refunds. See 31 U.S.C. 3720A (b) and 31 CFR 285.2. And it
8 certainly can file a lawsuit against a defaulted debtor and obtain a judgment.

9 Even if the Court finds that the evidence of record would permit a reasonable jury
10 to determine a "threat" was made, there is no evidence that the creditor (in this case, the
11 Department of Education) intended not to take the actions warned of. Nor is there any
12 evidence that the collector warned of potential events it knew the creditor did not intend
13 to take. Mr. Grover testified that the Department of Education could decide to pursue
14 one or all three of the collection activities warned of; it was up the Department to make
15 that decision, not the Defendant. There is therefore no evidence from which a reasonable
16 jury could find that the Defendant warned of consequences it knew the creditor did not
17 intend to take.

18 Besides lacking any evidentiary support, the Plaintiff's argument defies common
19 sense. Even if there was competent evidence in the record that Defendant's collector said
20 something like, "I hereby warn you that your failure to resolve this account could result
21 in an administrative wage garnishment, litigation, or the diversion of your income tax
22 refunds, if any," (and there is no such evidence), a "warning" is not a "threat."

23 Going back to basics, "warning" is defined as "a pointing out of danger.... The
24 purpose of a warning is to apprise a party of the existence of danger of which he is not
25 aware to enable him to protect himself against it." BLACK'S LAW DICTIONARY, Abridged
26 Fifth Edition (1983). In contrast, "threat" is defined as "a communicated intent to inflict

1 physical or other harm to any person or property. A declaration of intention or
2 determination to inflict punishment, loss, or pain on another, or to injure another by the
3 commission of some unlawful act.” *Id.*

4 The only evidence of record for a jury to hear on this issue is Paul Grover’s
5 testimony that the notation means GC warned the debtor of what might happen if he fails
6 to resolve the account. The potential events warned of were all legally permissible and
7 could in fact be taken by the Department of Education. There is no evidence in the
8 record as to the Department’s intent or lack thereof. While the FDCPA is a strict liability
9 statute, it does not relieve a plaintiff of the burden of proof.

10 **15 U.S.C. § 1692g – Failure to Provide Certain Information in Initial**
11 **Communications:** This section requires debt collectors to include certain information in
12 its initial collection communications with debtors. The Defendant has established that, in
13 accordance with its standard business practice, its Form Letter 30A was mailed to Mr.
14 Nichols at his parent’s address, which is one he admitted using as his permanent mailing
15 address. The Letter (in the record at Defendant’s SOF Exhibit G-1 clearly complies with
16 the statutory requirements.

17 Mr. Nichols testified he never received Form Letter 30A; he contends that his
18 ‘initial communication’ from Defendant was by telephone. Even if Mr. Nichols
19 testimony is accepted as true, however, it is of no moment that he did not receive Letter
20 30A. The Defendant is not required to demonstrate Mr. Nichols actually received the
21 letter and it is not necessary, to comply with the Act, that Mr. Nichols actually received
22 the letter.

23 GC Services has established through uncontroverted testimony of its 30(b)(6)
24 representative that Form Letter 30A was addressed to Mr. Nichols at his mailing address
25 on W. Harvest in Mesa, Arizona, that it was placed in the U.S. Mail from Defendant’s
26 headquarters in Houston, and that it was not returned to the Defendant by the post office.

1 In both Arizona state courts and this Federal Court district, there is a strong presumption
 2 that anything placed in the mail has been received. Circumstantial evidence regarding
 3 “routine custom and practice can be sufficient to support the inference that something is
 4 mailed.” *United States v. Green*, 745 F.2d 1205, 1208 (9th Cir.1985). “Direct proof of
 5 mailing is not required.” *Id.*

6 Moreover, other courts have found that debt collectors complied with the
 7 validation notice requirement of 1692g, where they included proper notice of debtor's
 8 right to contest the debt in letter and properly posted letter which debtor received, even
 9 assuming that debtor did not receive contents of letter. *Simmons v. Miller*, S.D.Ind.1997,
 10 970 F.Supp. 661 (emphasis added).

11 In short, the Defendant here has affirmatively demonstrated, with uncontroverted
 12 testimony, that its initial communication with Mr. Nichols was a Form Letter, sent to his
 13 mailing address, that included the required statutory language. Mr. Nichols has not come
 14 forward with any material evidence to controvert Mr. Grover's testimony; his only retort
 15 is that he did not get any such letter. Even if he is to be believed, it does not matter
 16 whether he received the letter or not. The Act requires a collector to transmit the
 17 information – not to demonstrate that it was received and appreciated.

18 With respect to his argument that Mr. Grover lacks personal knowledge from
 19 which to testify to the initial communication because he did not personally witness the
 20 mailing, that level of direct evidence is not required to establish that a mailing was
 21 accomplished. If it were, mailroom attendants everywhere, and not 30(b)(6)
 22 representatives, would be deposed in each and every one of these cases.

23 **15 U.S.C. § 1692c(c) – Communications with Debtor after Debtor Directs
 24 Collector to Cease and Desist:** This section forbids a collector from communicating
 25 with a debtor if the consumer notifies the debt collector in writing that he wishes the debt
 26 collector to cease further communications with him. This subsection is very specific as to

1 what constitutes proper notice to the collector: "If such notice from the consumer is
2 made by mail, notification shall be complete upon receipt."

3 Mr. Nichols testified he placed a letter in the mail to the Defendant (other than the
4 July 1 letter from his attorney to Defendant), but admitted he cannot prove that GC
5 Services received the letter because the certified return receipt green card was never
6 returned to him. Mr. Grover testified that any such letter, if GC received it, would be
7 noted and quoted in the Account Detail Listing. His testimony is verified by the
8 recitation of Mr. Meyers' July 1, 2008 letter, received by GC on July 8.

9 Mr. Nichols has not produced any evidence from which a jury could find that the
10 Defendant received his written cease and desist notice at any time before July 8, 2008.
11 He admittedly has none. The statute is clear that mailing is complete on receipt. There is
12 no evidence of any communications between Mr. Nichols and the Defendant after July 8,
13 2008.

14 **15 U.S.C. § 1692c (a)(3) - Improperly Communicating with Debtor at his
15 Place of Employment:** This section prohibits a collector from communicating with the
16 debtor at the debtor's place of employment if the collector "knows or has reason to know
17 that the consumer's employer prohibits the consumer from receiving such
18 communication." In his Response, Mr. Nichols contends that Defendant contacted him
19 at work in violation of this section. Yet there is no evidence that 1) Mr. Nichols'
20 employer had a policy prohibiting such calls, or the 2) Defendant knew of any such
21 policy, but called nonetheless.

22 The Plaintiff's own response to this section of Defendant's motion demonstrates
23 Defendant's point. Mr. Nichols admits that GC's collector detailed in writing in the
24 Account Detail Listing that Plaintiff told GC he did not want us calling him anymore at
25 work and he was afraid he would lose his job if the Defendant continued to call. See
26 Plaintiff's Response, p. 12, lines 9-15. That entry in the Account Detail Listing is

1 immediately followed by the collector's notation that the telephone number for Mr.
 2 Nichols' employer was removed from the file, to ensure that Defendant made no more
 3 calls to him there. There is no evidence that Defendant called Mr. Nichols at his place of
 4 employment after that note, which was made on June 28, 2008.

5 **15 U.S.C. § 1692c (b) – Collectors Prohibited from Communicating with**
 6 **Third Parties (except to acquire Location Information):** Mr. Nichols contends that
 7 the Defendant had improper communications in violation of this section with his mother,
 8 his son, a co-worker, and his former girlfriend. The only evidence he has offered on this
 9 count is his own testimony (with regard to his son, his former girlfriend and his co-
 10 worker), and his mother's testimony. The Plaintiff's testimony that Defendant
 11 improperly communicated with his son, his co-worker, and his ex-girlfriend constitutes
 12 classic hearsay as that term is defined by Rule 801, Federal Rules of Civil Procedure, and
 13 which is inadmissible pursuant to Rule 802. There are no applicable exceptions to the
 14 Rule that would allow Mr. Nichols to testify to what (if any) improper communications
 15 Defendant's collector had with these third-parties.

16 The Plaintiff did produce a witness – his mother -- to testify that she was
 17 repeatedly telephoned (15, 20 times) by someone from "GC Financial," and to testify to
 18 the improper content of those alleged communications. Nonetheless, the Defendant's
 19 Account Detail Listing on Mr. Nichols' account does not show any communication
 20 whatsoever with the Plaintiff's mother. Defendant conducted a search into its historical
 21 archives to determine how many, if any, telephone calls were placed to Plaintiff's
 22 mother's telephone number during the time period in question; that search likewise did
 23 not show any telephone calls made to Mrs. Mink's telephone number by any of the
 24 Defendant's three call centers that handle Department of Education accounts.

25 With regard to the record in this case, we have the Defendant's Account Detail
 26 Listing, which thoroughly details all collection activity Defendant conducted on

1 Plaintiff's account. It does not show any contacts whatsoever with the Plaintiff's mother,
2 nor any telephone calls placed to her telephone number. The record also includes the
3 results of research Defendant conducted into its archives to determine if the Plaintiff's
4 mother's telephone number was called by any of the Defendant's pertinent call centers
5 during the time in question. That search failed to turn up any hits – in other words, none
6 of the three call centers servicing this account telephoned the telephone number in
7 questions. And we have the Plaintiff's mother, who testified she was called so many
8 times she felt assaulted.

9 Defendant concedes that if a genuine factual dispute exists on any material issue in
10 this case, it is the "he-said she-said" dispute created by Plaintiff's mother's testimony.
11 But the test for summary judgment is not whether there is any evidence, but whether
12 there is sufficient evidence for a reasonable jury to find for the nonmoving party. *See*
13 *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248, 106 S.Ct 2505 (1986). "There is no
14 issue for trial unless there is sufficient evidence favoring the nonmoving party. If the
15 evidence is merely colorable or is not significantly probative, summary judgment may be
16 granted." *Gostony v. Diem Corporation*, 320 F.Supp.2d 932 (D.Ariz. 2003)(internal
17 citations omitted). There mere existence of a scintilla of evidence is insufficient; "there
18 must be evidence on which the jury could reasonably find for the plaintiff." *Id.* at 935.

19 In order for a jury to find in Plaintiff's favor on this claim, it would necessarily
20 have to find that the Defendant's records are so unreliable that up to twenty calls were
21 place to Plaintiff's mother, with no record made of them whatsoever. The jury would
22 also have to find, necessarily, that even though the other calls recorded in the Account
23 Detail Listing were found in the research of Defendant's archives, for some reason the
24 twenty or so calls made to Plaintiff's mother did not show up in the search.

25 Presented with the Defendant's collection record, the corroborating results of its
26 telephone number research, and the testimony of Pam Mink, Defendant must concede

1 that it would be possible for a jury to find for Mr. Nichols, but only if the jury was
2 inflamed or biased against debt collectors, unduly sympathetic to debtors, or suspicious
3 of a grand conspiracy (without evidence of one). Defendant submits, however, that it
4 would not be reasonable for a jury to find in Mr. Nichols' favor on this claims. Even this
5 claim should be dismissed in Defendant's favor.

6 **Plaintiff's Invasion of Privacy Claim:** Finally, Mr. Nichols has included an
7 invasion of privacy claim in his complaint. Defendant moved for summary judgment,
8 pointing out that the Plaintiff did not even plead the prima facie elements of such a tort,
9 let alone produce any evidence of one. Mr. Nichols apparently concedes this point
10 because his Response does not address this aspect of Defendant's motion.

11 In conclusion, while it is true that the FDCPA is a strict liability statute, Congress
12 did not relieve consumer-debtors of the burden of proof in passing it. The Court will
13 recall that according to his Interrogatory Answers, Mr. Nichols was unable to even
14 articulate what Defendant did, specifically, in violation of the Act; he needed to see
15 Defendant's collection notes, parts of which he relies on while also claiming they are
16 inherently unreliable.

17 Plaintiff has failed to produce sufficient evidence of improper threats, improper
18 contact with third-parties, contact after Defendant received a cease and desist notice, or
19 the failure to provide the information required in initial communications with a debtor.
20 Each of the Plaintiff's FDCPA claims against the Defendant should be dismissed, and
21 summary judgment granted, in Defendant's favor.

22 DATED this 31st day of August, 2009.

23

24

/s/ Victoria L. Orze
Victoria L. Orze
Attorneys for Defendant

25

26

CERTIFICATE OF SERVICE

I certify that on the 31st day of August, 2009, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

4 Marshall Meyers, Esq.
mmeyers@attorneysforconsumers.com
5 Weisberg & Meyers, LLC
5025 North Central, Suite 602
6 Phoenix, Arizona 85012
Attorneys for Plaintiffs

By /s/ Victoria Orze